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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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MM Docket No. 93-8

In the Matter of)
Implementation of Section 4(g) of the)
Cable Television Consumer Protection)
Act of 1992)
Home Shopping Station Issues)

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby respectfully submits its comments in the above-captioned proceeding. NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable television system owners and operators, cable television programmers, and others interested in or affiliated with the cable television industry.

INTRODUCTION

In this proceeding, the Commission seeks comments on implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992. In Section 4(g), Congress singled out home shopping stations for special scrutiny by the Commission in connection with the new "must carry" provisions of the Act. Those provisions require cable operators

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to carry certain "qualified" local commercial televisions stations on their systems. At issue in this proceeding is whether home shopping stations are to be deemed "qualified" for such purposes.

Under Section 4(g), cable operators are not required to carry stations that are "predominantly utilized for the transmission of sales presentations or program length commercials" until this proceeding is completed. Unless the Commission finds that such stations "are serving the public interest convenience and necessity", they will not be entitled to mandatory carriage.

Even if the Commission were to decide that one or more stations that present home shopping programming met the minimum requirements for retaining their broadcast licenses (an issue on which we express no opinion), these stations generally provide no unique public benefits that warrant protected, must carry status. To the contrary, giving home shopping stations guaranteed carriage at the expense of non-broadcast program services would disserve the public interest and should not be required by the Commission.

DISCUSSION

A. Mandatory Carriage of Home Shopping Stations is Not Warranted.

NCTA and others in the cable industry have challenged the constitutionality of the must carry rules contained in Sections 614 and 615 of the 1992 Cable Act.^{1/} We do not believe a case has been made that justifies the statute's substantial intrusion into the editorial judgments of cable operators as to what programming to present to their subscribers, or its elevation of the rights of certain speakers (broadcasters) over other speakers (cable programmers). But even assuming, arguendo, the constitutionality of the must carry rules in general, there is no public interest justification for extending mandatory carriage privileges to home shopping stations.

In adopting local commercial television station must carry requirements, Congress asserted that this intrusion was necessary to serve the substantial governmental interests of preserving localism and diversity. Congress found that:

"a primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation." Section 2(a)(10) (emphasis added).

"Broadcast television stations continue to be important sources of local news and public affairs programming and other local broadcast services

1/ National Cable Television Association, Inc. v. U.S., Civil Action No. 92-2495 (D.D.C., filed Nov. 5, 1992).

critical to an informed electorate;" Id. at (a)(11) (emphasis added).

"As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic vitality of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." Id. at (a)(16) (emphasis added.)

Congress also asserted that the Cable Act is designed to "promote the availability to the public of a diversity of views and information through cable television" Section 2(b)(1).

While Congress assumed, without any evidence, that mandatory carriage of virtually all "local" full power commercial television stations would advance these allegedly "substantial" governmental interests,^{2/} Congress excluded home shopping stations from this automatic presumption. As a result, in the case of home shopping stations, the Commission must examine whether the interests underlying must carry would be furthered by requiring carriage of one or more of these particular types of stations. Upon examination, there is no fit between the interests advanced by Congress and must carry rights for home shopping stations.

First, there is scant evidence that home shopping stations provide much locally originated programming beyond makeweight, de

2/ We do not believe that absent mandatory carriage, any of these -- or other alleged governmental interests -- are threatened.

minimis interstitial material -- much less an amount of local programming so that failure to carry any one of these stations would threaten "localism" at all. Testimony during hearings on S.12 revealed that home shopping stations typically provide only two to five minutes an hour of non-commercial matter, which is often taped and repeated throughout the week.^{3/} As Senator BreauX noted during the Senate floor debate on S. 12, these stations typically carry up to 23 hours a day of satellite-delivered sales presentations interspersed with a total of only 1 hour of non-home shopping programming.^{4/}

satellite-delivered commercial announcements daily in order to ensure access to these occasional non-promotional messages.

Congress' interest in an informed electorate would only be disserved by granting home shopping stations preferential carriage rights vis-a-vis cable programming services that do provide news and public affairs programming on a regular, in-depth basis -- such as C-SPAN, CNN, local cable news channels, and other cable programming services not available over-the-air. These channels are often not carried because of channel limitations which must carry status for home shopping broadcast stations would worsen. For instance, C-SPAN is carried in over 57 million households, while C-SPAN II reaches 27.9 million households.

Third, forcing carriage of home shopping stations does little to further the Congressional goal of fostering "diversity". The majority of all cable subscribers already obtain home shopping programming on HSN 1 or HSN 2, QVC or the QVC Fashion Channel.^{6/} Requiring cable systems to add over-the-air home shopping channels, therefore, will add nothing to the mix of services on the cable system and may duplicate a service already being carried by satellite-fed delivery. And where channel capacity is limited -- as is the case for many cable systems -- mandatory carriage could well result in operators

6/ Based on Nielsen data, over 24 million cable subscribers obtain HSN 1 or HSN 2 programming; over 44 million cable subscribers obtain QVC or QVC Fashion.

being forced to bump programming that does contribute to "diversity".

In short, mandatory carriage of home shopping stations would do nothing to further what Congress hoped to achieve through its must carry requirements. Moreover, as the Court of Appeals for the D.C. Circuit instructed, where must carry rules "indiscriminately sweep in their protective ambit each and every broadcaster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community", the rules cannot be sustained.^{7/} Accordingly, even aside from whether carriage of broadcast home shopping stations would promote the interests that Congress had in mind, the intrusion into cable operators' and programmers' First Amendment rights caused by granting such stations a preferred position on cable systems cannot be justified under the First Amendment.

Even if home shopping stations did present a modicum of truly local programming beyond their de minimis offerings, that would, of course, still not be enough to justify requiring their carriage by cable systems. It is dubious that any governmental interest could justify the severe intrusion that must carry rules inflict on the speech rights of cable operators and programmers. But, as the Court of Appeals made clear, even if such a

7/ Quincy Cable TV, Inc. v FCC, 768 F.2d 1434, 1463 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

governmental interest existed, must carry rules would need to be narrowly tailored to serve the governmental interest. Requiring carriage of 23 hours of home shopping station programming would be a fatally overbroad response to assuring the continuation of "localism" and "diversity", in light of other must carry requirements. Instead, such a requirement would automatically protect each and every local station -- no matter how remotely carriage would be related to serving those interests. Such "undifferentiated protectionism"^{8/} of home shopping stations -- and all other broadcast stations, under Section 4 of the Act -- is impermissible.

B. Mandatory Carriage of Home Shopping Stations Would Harm, Not Help, Competition.

In analyzing whether home shopping stations are serving the public interest, the Cable Act also directs the Commission to consider their role in providing competition to nonbroadcast services offering similar programming. The Notice queries whether broadcast home shopping services suffer a competitive disadvantage as against cable home shopping services because of the broadcast stations' supposed public interest obligations -- a disadvantage that should be remedied by granting them mandatory carriage rights.^{9/}

8/ Id. at 1462.

9/ Notice at para. 9.

We fail to understand how obtaining free use of public spectrum to reach all viewers over-the-air in exchange for agreeing to provide a modicum of public interest programming in any way harms over-the-air stations vis-a-vis cable programmers. If any entity is competitively disadvantaged by this arrangement, it is the cable programmers. They do not have a governmentally granted pathway to the home. Their only access to their intended audience is by negotiating agreements for carriage on cable systems and other video programming distributors.

If a station's inability to air a 24th hour of home shopping programming daily somehow hampers its ability to compete, mandatory carriage should not be an additional reward for a station's merely living up to its promise to the FCC and the public. The home shopping broadcast station has voluntarily selected a format that duplicates (and is generally simulcasting) a format widely available on cable systems. The choice is made for economic reasons that keep program acquisition costs low and allow for revenues to be generated without regard to audience ratings. That choice leads them to be a less desirable program selection than other program services for the cable operator. The consequences of that broadcaster's voluntary decision should not be undone by granting must carry status.

A must carry duty on cable systems would only act to destroy the competitive marketplace for these services by conferring an enormous advantage on broadcast stations over their cable network competitors. Only broadcast stations could be sure that they would be carried, and carried on favorable channel positions on

the basic tier provided to all subscribers. Cable programmers must vie for carriage in the marketplace, and, due to the must carry rules that now protect stations other than home shopping stations, they must compete for a proportionately diminished number of available cable channels at that.

The Commission also seeks comment on how best to promote programming diversity and market competition among home shopping services -- broadcast and non-broadcast.^{10/} The best way to ensure that competition is to keep government out of carriage decisions. Mandatory carriage stifles competition, precisely because the protected broadcaster does not have to compete for carriage. It skews the marketplace against competing providers of home shopping services and other programmers vying for access to more limited channel capacity -- and it interferes with consumer preferences. Must carry privileges for home shopping over-the-air stations, therefore, would have a profoundly anticompetitive impact.

Finally, the Notice asks whether operators favor home shopping services in which they have an ownership or contractual interest, so that mandatory carriage for over-the-air stations is warranted. As NCTA explained in its comments in the Commission's on-going proceeding on ownership issues, the effect of vertical integration on carriage decisions by cable operators is

10/ Notice at para. 10.

attenuated at best.^{11/} And in any event, if vertical integration is the problem, must carry is not the solution. Instead, any anticompetitive actions can be properly dealt with by enforcement of the antitrust laws against particular offenders -- not by giving an anticompetitive advantage to all broadcast home shopping stations by granting must carry status.

CONCLUSION


Cable systems have responded to subscriber preferences by offering home shopping services. But nothing other than naked broadcast protectionism could form the basis for requiring cable systems to provide over-the-air home shopping stations to their subscribers. Must carry rights -- privileges extended to over-the-air broadcasters that inevitably come at the expense of cable

^{11/} See Comments of the National Cable Television Association, Inc., MM Docket No. 92-264 at 10 (filed Feb. 9, 1993) and Appendix A at 37.

operators' and cable programmers' First Amendment rights --
should not be extended to home shopping stations.

Respectfully submitted,

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